



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 11, 1995

Ms. Lisa McNair Palmer
Hilgers & Watkins
San Jacinto Center, Suite 1300
98 San Jacinto Boulevard
Austin, Texas 78701

OR95-178

Dear Ms. Palmer:

As counsel for the Austin-Travis County Mental Health-Mental Retardation Center (the "center"), you ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 32140.

You ask for reconsideration of Open Records Letter No. 95-091 (1995), which determined that the center must release certain requested information, with the exception of a small portion of private financial information that was excepted from required public disclosure based on section 552.101 of the Government Code. You inform us that part of the information at issue in Open Records Letter No. 95-091 (1995) was not in existence when the center received the request for information. The Open Records Act does not require a governmental body to disclose information when at the time it receives the request, it does not exist. *See* Open Records Decision No. 452 (1986) at 3. Therefore, Open Records Letter No. 95-091 (1995) is modified to the extent it requires the center to release information that did not exist when the center received the request.¹

¹The center received the request for information on December 16, 1994. The information that was not in existence when the center received the request is a document titled "Final Report with Addendum of Internal Investigation of Complaint Received November 1994 Regarding Procurement Process." This report is dated December 28, 1994, and was in existence when the center requested a decision from this office on January 6, 1995.

The center has now received a second request for information.² The second request is for the information that was not in existence in Open Records Letter No. 95-091 (1995), a report and addendum prepared by outside counsel concerning an investigation of a complaint that the award of a contract for roof installation for the center was the result of bid rigging, and for another document, which you have marked as Exhibit C. You assert that portions of this information are excepted from required public disclosure based on sections 552.101, 552.103, 552.107(1), and 552.111 of the Government Code.

We begin with the report and addendum. Section 552.101 excepts from required public disclosure information considered to be confidential by law, including information made confidential by judicial decision. This exception applies to information made confidential by the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *See id.*

We conclude that the center may withhold from required public disclosure one small portion of private financial information. This information is not related to the bidding process and thus is of no legitimate concern to the public. We have marked the documents accordingly.

You also raise section 552.107(1). This exception states that information is excepted from required public disclosure if

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas.

Although section 552.107(1) appears to except information within rule 1.05 of the Texas State Bar Disciplinary Rules of Professional Conduct, the rule cannot be applied as broadly as written to information that is requested under the Open Records Act. Open Records Decision No. 574 (1990) at 5. To prevent governmental bodies from circumventing the Open Records Act by transferring information to their attorneys, section 552.107(1) is limited to material within the attorney-client privilege for confidential communications; "unprivileged information" as defined by rule 1.05 is not excepted under section 552.107(1). Open Records Decision Nos. 574 (1990) at 5; 462 (1987) at 13-14.

²You inform us that the center received this request on March 3, 1995.

Thus, this exception protects only the essence of the confidential relationship between attorney and client from the disclosure requirements of the Open Records Act and applies only to information that reveals attorney advice and opinion or client confidences. *See* Open Records Decision No. 574 (1990). We have marked the portions of the information that contain attorney advice and opinion and which the center may withhold from required public disclosure based on section 552.107(1). *See* Open Records Decision No. 462 (1987).

Turning to Exhibit C, it is unclear whether this document was in existence at the time of the first request. Based on the content of the document, it seems possible that the document did exist when the center received the first request. If this is so, Exhibit C must be released pursuant to Open Records Letter No. 95-091 (1995). In the event that Exhibit C did not exist when the center received the first request, we will consider the exceptions you raise, sections 552.101, 552.103, 552.107(1), and 552.111 of the Government Code.

You explain that Exhibit C was prepared by the center's in-house attorney for the center's outside counsel to review and provide advice. You do not explain how sections 552.101 or 552.103 apply to Exhibit C. If a governmental body does not establish how and why an exception applies to requested information, we have no basis on which to pronounce it protected. *See* Open Records Decision No. 363 (1983). Thus, the center may not withhold Exhibit C based on sections 552.101 or 552.103.

We have already described the scope of section 552.107(1). We do not believe that exception applies to exhibit C. The information in Exhibit C does not include attorney advice and opinion or client confidences.

Nor does section 552.111 except Exhibit C from public disclosure. Section 552.111 of the Government Code excepts from required public disclosure:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

This exception applies to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policymaking process of the governmental body at issue. *See* Open Records Decision No. 615 (1993). This exception does not except from disclosure purely factual information that is severable from the opinion portions of the communication. *See id.*

Exhibit C contains no advice, recommendations, or opinions reflecting the center's policymaking process. Consequently, the center may not withhold Exhibit C from disclosure based on section 552.111 of the Government Code. The center must release Exhibit C.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Kay Guajardo". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Kay Guajardo
Assistant Attorney General
Open Government Section

KHG/rho

Ref.: ID# 32140

Enclosures: Marked documents

cc: Mr. Mike Todd
Reporter
Austin American Statesman
P.O. Box 670
Austin, Texas 78767-0670
(w/o enclosures)